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Nos. 75-62, 75-66, 75-278 and 75-306

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

RUSSELL L. RUNYON, *et ux.*, *Petitioners*,

v.

MICHAEL C. McCRARY, etc., *et al.*, *Respondents*.

FAIRFAX-BREWSTER SCHOOL, INC., *Petitioner*,

v.

COLIN M. GONZALES, etc., *et al.*, *Respondents*.

SOUTHERN INDEPENDENT SCHOOL ASSOCIATION, *Petitioner*,

v.

MICHAEL C. McCRARY, etc., *et al.*, *Respondents*.

MICHAEL C. McCRARY, etc., *et al.*, and
COLIN M. GONZALES, etc., *et al.*, Petitioners,

v.

RUSSELL L. RUNYON, KATHERYNE E. RUNYON,
d/b/a BOBBE'S PRIVATE SCHOOL, and
FAIRFAX-BREWSTER SCHOOL, INC., *Respondents*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF OF PLAINTIFFS BELOW IN NOS. 75-62, 75-66 and 75-278, AND REPLY BRIEF IN NO. 75-306

RODERIC V. O. BOGGS
Washington Lawyers' Committee for Civil Rights Under Law
733 15th Street, N.W.
Washington, D.C. 20005
Of Counsel

ALLISON W. BROWN, JR.
Suite 301
1345 E Street, N.W.
Washington, D.C. 20004

ROBERT M. ALEXANDER
2011 South Glebe Road
Arlington, Virginia 22204
Attorneys for Petitioners

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I

As an initial matter, plaintiffs wish to respond to what seems to be a new line of argument by defendant Fairfax-Brewster School in its reply brief concerning the applicability of 42 U.S.C. Sec. 1981 to nonpublic schools. The

school advances certain contentions that were not clearly stated in its opening brief but which allegedly support its position that the legislative history of the Civil Rights Act of 1866 discloses a congressional intent not to apply the provisions of the statute to schools such as those at issue here. As we show below, these contentions are wholly lacking in merit.

It is true, as Fairfax-Brewster points out, that there were differences between the Civil Rights Act of 1866 as it was originally introduced and as it was finally enacted by Congress. Those differences, however, are not relevant to the question of whether the statute applies to the defendant schools. The principal changes in the legislation resulting from the congressional debates were in Section 1 which contained the language embodied in 42 U.S.C Sec. 1981.[1] One of the changes was the elimination of the

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[1] As introduced, Section 1 read as follows (36 Cong. Globe, 39th Cong., 1st Sess. 129, 211-212 (1866)):

> That there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.

(continued)

language contained in the first sentence of the original bill which provided that there would be "no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color or previous condition of slavery . . . ." The explanation for this change is summarized in an informative article by Alfred H. Kelly, the constitutional historian who is cited in Fairfax-Brewster's reply brief.[2] Thus, following the introduction in Congress of the bill that was to become the 1866 Act, sharp controversy developed over the scope and meaning of the guarantee of civil rights in the

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[1] (Continued)

Section 1, as enacted, provided as follows (14 Stat. 27):

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

[2] Kelly, The Fourteenth Amendment Reconsidered, 54 Mich. L. Rev. 1049 (1956). With respect to matters relevant herein, Kelly's account of the legislative history of the 1866 Act accords substantially with the work of others who have studied the proceedings of the Reconstruction Congress. See Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1, 11-29 (1955); Frank and Munro, The Original Understanding of "Equal Protection of the Laws", 50 Col. L.Rev. 131, 139-142 (1950).

first section. Conservatives opposing the bill argued that it would invalidate state laws forbidding racial inter-marriage and providing for segregated schools, transportation facilities and theatres. To reach this conclusion, they seized on a broad and expansive interpretation of the term "civil rights" in the first sentence.[3] Some of the bill's defenders took the bold course of admitting the sweeping effect ascribed to the bill, while others resorted to vague assurances that "civil rights" had a narrower meaning than the conservatives claimed and that the bill would not upset state discrimination laws.[4] The Senate passed the bill on February 2, 1866, with the "no discrimination in civil rights" clause intact.[5] The House took up the bill on March 2 and Congressman James Wilson of Iowa, Chairman of the House Judiciary Committee, defended the measure by giving a narrow construction to the phrase in question. It was in this context that he made the statement, relied on in the opening briefs of the defendant schools to the effect that the bill's guarantee of "civil rights and immunities" would not give Negroes the right to vote, to serve on juries or to attend integrated schools – all matters which were affected at the time by various state discrimination laws.[6] The conservatives were unpersuaded, however, so an amendment was offered to strike out the "no discrimination in civil rights" clause from the bill and thereby eliminate apprehension that the bill would invalidate state segregation laws.[7] The sponsor of the

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[3] Kelly, *supra*, at 1063-1064.

[4] *Id.* at 1065.

[5] 36 Cong. Globe, 39th Cong., 1st Sess. 606-607 (1866).

[6] *Id.* at 1117.

[7] *Id.* at 1271-1272, 1291-1293.

amendment was Congressman John Bingham of Ohio, a member of the Joint Committee on Reconstruction, which was then engaged in drafting what was to become the Fourteenth Amendment. Bingham's view and that of the majority of Congress, was that state discrimination laws should more appropriately be dealt with by constitutional amendment than by a statute adopted under the Thirteenth Amendment.[8] Accordingly, the bill that passed both Houses of Congress and was finally enacted over President Johnson's veto omitted the "no discrimination in civil rights" clause.[9]

It is perfectly plain, therefore, from the legislative history of the 1866 Act that by eliminating the "no discrimination in civil rights" clause, Congress merely wished to make clear that it did not intend this enactment to invalidate state discrimination laws, including laws existing in a number of states that provided for racially segregated schools. The role of bringing state laws into line with Federal constitutional standards was assigned to the Fourteenth Amendment. The 1866 Act, in contrast, represents legislative implementation of the Thirteenth Amendment through the proscription of specified conduct which Congress determined to be among the "badges and incidents of slavery." *Jones v. Mayer Co.*, 392 U.S. 409, 439-441 (1968). Clearly, the fact that Congress did not intend the 1866 Act to be a vehicle for invalidating state laws requiring segregation of schools and other facilities does not avail defendants here, for this proceeding obviously does not involve state-imposed discrimination. Rather, it involves discrimination by private parties of a type which, as shown

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[8] Kelly, *supra*, p. 1067-1069.

[9] Cong. Globe, *supra*, at 1366-1367, 1413-1416, 1809, 1860.

in plaintiffs' opening brief, falls within the ambit of 42 U.S.C. Sec. 1981.

It is likewise difficult to see any relevance to the further point made by Fairfax-Brewster in its reply brief (pp. 7-8) concerning the addition by the House to Section 1 of the 1866 Act of the phrase "as is enjoyed by white persons." Although not in the bill as it originally passed the Senate, the addition of the phrase is correctly explained by Fairfax-Brewster in its reply brief (p. 7) where it notes Congressman Wilson's statement that the limited purpose of the amendment was to preclude a construction of the statute that would remove the existing legal disabilities of minors and females.[10] Surely, Fairfax-Brewster cannot be suggesting that the addition of this phrase to the bill is significant here merely because Michael McCrary and Colin Gonzales are minors. For it hardly seems necessary to note that the contracts at issue here are not between the schools and minors who are enrolled as pupils, but rather, the contracting parties are the parents who pay the enrollment fees and tuition.

II

In responding to plaintiffs' argument that attorneys' fees should be awarded here under the bad faith principle because of the oppressive effect of racial discrimination on its victim, Fairfax-Brewster (Br. 15-16) takes the remarkable position that the racial discrimination experienced by the Gonzales had no oppressive effect. As we show, this assertion is directly contradicted by the facts of record. Thus,

[10] Cong. Globe, 39th Cong., 1st Sess., App. 156-157 (1866). See also the colloquy between Senators Van Winkle and Trumbull quoted in Fairfax-Brewster's reply brief (pp. 7-8). Cong. Globe, *supra*, at 1413.

the evidence shows that after Mr. Gonzales learned that Colin could not attend Fairfax-Brewster because of his race, he was upset and angry, and in his frustration called the U.S. Department of Health, Education and Welfare to find out if anything could be done about Colin's rejection (A. 181-182, 211). This proved futile, of course, since the school receives no government funds. Mrs. Gonzales testified that her husband was "very angry" and that she also was upset by Colin's rejection (A. 181-182). The Gonzales' had taken Colin to visit Fairfax-Brewster and he had been "impressed" and "excited" by what he saw (A. 179). He was also excited about attending the school's summer camp (A. 185). After Colin was rejected, however, his parents told him that he could not attend Fairfax-Brewster because "they do not accept black children there" (A. 213). He was "disappointed" and "upset" (A. 186, 213-214). Mrs. Gonzales testified, "[I]t was the first experience we were having in this situation. So, you know, it took some explaining to him. . ." (A. 186). Responding to Colin's question as to why other children could attend the school and he could not, his father told him, "Well, see we're different than they are, as a result, these are the rules . . . you can't attend" (A. 213). Following Colin's rejection, Mrs. Gonzales testified, he "was quite conscious then that – I mean . . . realized that there was a difference as regards how others felt about him" (A. 193-194).

Fairfax-Brewster also suggests (Br. 11) that an award of attorneys' fees based on the bad faith principle could not be supported in this case because the district court declined to award punitive damages to the plaintiffs below. As this Court has explicitly recognized in *Hall v. Cole*, 412 U.S. 1 (1973), however, there is no necessary relationship between an award of attorneys' fees on the basis of bad faith and a failure to award punitive damages to a prevailing party. Thus as the Court said (412 U.S. at 15):

> Petitioners also contend that the award of attorneys' fees in this case was improper because the District Court, in denying respondent's claim for punitive damages, found that 'the defendants, in good faith, believed that they had a right to charge and discipline [respondent] for his actions.' It is clear, however, that 'bad faith' may be found, not only in actions that led to the lawsuit, but also in the conduct of the litigation. And, as the Court of Appeals noted, the conduct of this particular litigation was marked by 'the dilatory action of the union and its officers . . . '

This Court's recognition of vexatious litigation tactics as an independent basis for a determination of bad faith and the award of attorneys' fees in *Hall v. Cole* accords with its prior decision and has been followed by many lower courts. See, *e.g.*, plaintiffs' opening brief at 15-16 and *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402, n. 4. Courts have frequently cited litigation tactics similar to those engaged in by the defendants in this case as grounds for an award of attorneys' fees under the bad faith rationale. For example, in *Skil Corporation v. Lucerne Products, Inc.*, 503 F.2d 745, 750 (C.A. 7, 1974), *cert. denied*, 420 U.S. 974, the Seventh Circuit found fees properly awardable in large measure because the district court had found the defendant's testimony "disingenuous," and given with "deceptive intent." Likewise, in *Thonen v. Jenkins*, 517 F.2d 3, 6-7 (C.A. 4, 1975), the award of fees was premised upon the defendants' litigation conduct which included the appeal of a consent order they had suggested and their insistence upon an incorrect procedural position which required an unnecessary trip to the chambers of the judge. Similarly, in *Newman v. Piggie Park Enterprises*, this Court noted that reliance upon groundless contentions for the purpose of

delay has long been recognized as a basis for the award of fees. 390 U.S. at 402, n. 4, 5. The willingness of courts to award fees based on bad faith in litigation has its origin in the twin concerns that the integrity of judicial process should not be "defiled" and that litigants should not be subjected to unnecessarily extended litigation or undue expense. *Universal Oil Products v. Root Refining Co.*, 328 U.S. 575, 580 (1946).[11] See also *L.F. Strassheim Co. v. Gold Metal Folding Furniture Co.*, 477 F.2d 818, 823-824 (C.A. 7, 1973); *Fireman's Fund Insurance Co. v. Santoro*, 376 F.2d 157, 160 (C.A. 1, 1967).

Certainly, defendants' denial under oath of a policy of denying the admission to their school of black children generally, and these plaintiffs in particular, – a denial which was expressly rejected by the district court as not credible – is no less an abuse of the judicial process than the conduct condemned by the courts in the foregoing cases. While defendants are, of course, entitled to a judicial determination of their right to exclude black children, this right affords no license to needlessly protract litigation by attempting to conceal their discriminatory conduct. By resorting to this tactic, defendants compelled plaintiffs to unduly extend their pre-trial discovery and to engage in a lengthy trial on the question of whether black pupils had been excluded. Moreover, by persisting in this discredited defense on appeal, defendants placed an unwarranted burden on both plaintiffs and the court of appeals.

Citing *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), defendant Fairfax-Brewster

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[11] Although it is of no relevance to the issue before the Court, plaintiffs wish to correct their statement of the holding in *Universal Oil Products* noted in their opening brief at p. 15. In fact, the Court in that case reversed the decision of the court of appeals on grounds unrelated to the issue of bad faith.

suggests (Br. 7) that 28 U.S.C. Sec. 1923 is inconsistent with the discretionary allowance of attorneys' fees under the authorization of 42 U.S.C. Sec. 1988. Plaintiffs submit, however, that the legislative history of Sec. 1988 and the purposes of the original Congressional limitation of fees now found in 28 U.S.C. Sec. 1923 are wholly supportive of such an award of fees in civil rights cases brought under the Civil Rights Act. See plaintiffs' opening brief at pp. 19-22. As this Court noted in *Alyeska*, 421 U.S. at 251, a principal purpose of the congressional limitation of court-awarded fees in Sec. 1923 was to standardize the award of fees and control the great diversity of practices which had been adopted under state laws then applicable to federal cases. This objective is in no way compromised by authorizing federal courts to resort to federal laws which modify this fee schedule. Therefore, petitioners submit that the authorization of Sec. 1988 should be viewed as a specific and limited modification to the attorneys' fees limits of Sec. 1923. Such a view is entirely consistent, if not required, by the indisputable intent of Congress, as evidenced by the plain statutory language of Sec. 1988, to make available to the courts adjudicating claims under provisions of the Civil Rights Act of 1866 the broadest possible range of remedial relief.[12]

As a final matter, it should be noted that the award of attorneys' fees by the district court in this case preceded this Court's decision in *Alyeska*. In addition, neither the applicability of the bad faith exception nor of Sec. 1988

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[12] While, as plaintiffs have discussed in their opening brief (at p. 20), Sec. 1988 authorizes an initial resort to other federal laws to locate suitable remedies in suits brought under the 1866 Civil Rights Act, it is significant that Virginia law places no ceiling on the equitable award of attorneys' fees. See Sec. 14.1-177, Code of Virginia (1950).

with respect to the award of attorneys' fees was raised before the district court or addressed in briefs submitted to the court of appeals. The basis for the district court's award of attorneys' fees in this case was not explained in its opinion. In light of these facts, it should be pointed out that several other cases involving the issue of attorneys' fees which were pending at the time of this Court's decision in *Alyeska* have been remanded by courts of appeals for reconsideration of the fees issue by trial judges. *See, e.g., Doe v. Poelker*, 515 F.2d 541, 548 (C.A. 8, 1975); *Newman v. State of Alabama*, 522 F.2d 71, 72 (C.A. 5, 1975); *Wright v. Jackson*, 522 F.2d 955, 958 (C.A. 4, 1975), and *Wade v. Mississippi Cooperative Extension Service*, ___ F.2d ___ (C.A. 5, Feb. 24, 1976). The decisions of these courts are predicated on the standard practice of affording great weight to the exercise of a trial judge's discretion in the determination of bad faith and the appropriateness of awarding attorneys' fees. *Jenks v. Mays*, 464 F.2d 1223, 1228 (C.A. 5, 1972); *Monroe v. Board of Commissioners of City of Jackson*, 453 F.2d 259, 263 (C.A. 6, 1972); *Rolax v. Atlantic Coast Line R. Co.*, 186 F.2d 473, 481 (C.A. 4, 1951).

In sum, petitioners submit that the record of this case provides ample support for this Court's affirmance of the district court's award of attorneys' fees under either the bad faith exception to the American rule or the statutory authorization of Sec. 1988. Should this Court be unable to sustain an award of fees in this case based on the present record, a remand to the district court would be appropriate.

III

In discussing the appropriate statute of limitations to be applied to claims under Sec. 1981 in Virginia, defend- and Fairfax-Brewster has erroneously stated (Br. 20) that this Court's decision in *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), held a one-year statute of limitations to be applicable to an action brought in Tennessee under Sec. 1981. In fact, as was specifically noted in the opinion of Mr. Justice Blackmun, the issue of the proper statute of limitations was not before the Court in that case because *certiorari* had been denied as to that question. *Johnson, supra,* at n. 7.

Respectfully submitted,

ALLISON W. BROWN, JR.
Suite 301
1345 E Street, N.W.
Washington, D.C. 20004

ROBERT M. ALEXANDER
2011 South Gl ebe Road
Arlington, Virginia 22205

Attorneys for Petitioners

RODERIC V.O. BOGGS
Washington Lawyers' Committee for Civil Rights Under Law
733 15th Street, N.W.
Washington, D.C. 20005

Of Counsel

April, 1976.